Supreme Court, U.S.
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No. 00-620

IN THE

Supreme Court of the United States

MANTALINE CORPORATION,

Petitioner,

v.

PPG INDUSTRIES, INC. and
AMERICAN ARBITRATION ASSOCIATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT PPG INDUSTRIES, INC.

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QUESTIONS PRESENTED

1. Under Ohio law, does a contract for the sale of goods contain an arbitration clause when the sole written offer contains that clause and the offeree promptly accepts the offer and performs, without any objection to the offer's proposed terms, without any proposal for additional terms, and without so much as suggesting a negotiation over the terms of the contract.

2. Does Ohio Revised Code § 1302.10 apply when the offer expressly limits acceptance to the terms of the offer, and the offeree accepts the offer without "stat[ing] terms additional or different from those offered or agreed upon. . . ." Ohio Rev. Code § 1302.10(A).

STATEMENT PURSUANT TO RULE 29.6

Respondent, PPG Industries, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

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STATEMENT OF THE CASE

At some time before January of 1986, Respondent PPG Industries, Inc., a Pennsylvania corporation, asked several companies, including Petitioner Mantaline Corporation, an Ohio company, to provide it with a written quotation for the supply of interior and exterior glazing gaskets for use by PPG in the Security Life Center; an office building in Denver, Colorado. PPG wanted those gaskets as part of its bid to supply windows for the Security Life building.

PPG personnel testified at deposition that they probably received Mantaline's response to PPG's request. Although the original was not in the parties' records, Mantaline's response was a standard quotation form which had several pre-printed terms, including the terms:

> This proposal is for immediate acceptance only and is subject to change at any time before orders are accepted by us. This proposal and our acceptance of your orders, signed by a representative of our Company, together with your order, constitutes the entire contract between us.

(Petition for Writ of Certiorari Appendix at 98a). Both the district court and the Court of Appeals held that, in light of this terminology, Mantaline's quotation form was not, under Ohio law, a contractual offer; but was rather simply an invitation to deal.

In January of 1986, PPG issued a purchase order to Mantaline, asking it to supply the gaskets and related materials described in the request for a written quotation, at the price of $56,399.36. The purchase order was expressly

conditioned on the supplier's (Mantaline's) consent to all its terms, and indicated that the supplier's assent to the purchase order's terms "will be manifested by delivery of any portion of the goods designated herein."[1] The purchase order included both an indemnity clause and an arbitration provision. Petitioner Mantaline shipped the ordered goods without adding or disclaiming any contract terms.

Because of damage caused to the windows when the gaskets installed at the Security Life building leached sulfur, Security Life sued PPG in the United States District Court for the Southern District of Colorado. After that litigation was concluded, PPG commenced arbitration proceedings seeking indemnity, which prompted this lawsuit. Mantaline brought suit in Ohio state court, seeking both a declaratory judgment over the terms of the parties' contract and an injunction enjoining PPG from compelling arbitration. PPG removed the case to the United States District Court for the Northern District of Ohio on the basis of diversity jurisdiction.

In the district court, although the court held that Petitioner Mantaline's standard quotation form was not an offer, it nonetheless contradicted PPG's terms, supporting application of Ohio Rev. Code § 1302.10(C), a portion of Ohio's version of U.C.C. 2-207, the "battle of the forms" provision. In so doing, the district court relied upon a previous Sixth Circuit opinion construing Ohio's UCC sales provisions, *McJunkin Corp. v.*

1. The Appendix to the Petition does not contain the full text of the PPG's purchase order. Particularly, and peculiarly given the attention directed to it by the Sixth Circuit, the Appendix does not contain the fully capitalized condition which appeared on the face of the purchase order, which stated "THIS PURCHASE ORDER IS EFFECTIVE AND EXPRESSLY CONDITIONAL ON SUPPLIER'S ASSENT TO ALL TERMS AND CONDITIONS IN THIS PURCHASE ORDER. . . ." (*See* Sixth Circuit's Opinion, Petition at 6a).

Mechanicals, Inc., 888 F.2d 481 (6th Cir. 1989). Inasmuch as Ohio Rev. Code § 1302.10(C) provides, in part, that "the terms of the particular contract consist of those terms on which the writings of the parties agree", the district court held that the parties had not agreed to arbitrate, and granted summary judgment in favor of Petitioner Mantaline.

On appeal, the Sixth Circuit reversed. The Circuit Court found that inasmuch as there was but one offer, and inasmuch as Petitioner Mantaline performed without any exception or disclaimer to the terms of the offer, a contract was formed on Respondent PPG's terms; hardly a novel proposition. In its discussion, the Sixth Circuit found that Section 1302.10(C) "does not exist in isolation." (Petition for Writ of Certiorari Appendix at 6a). The Court found that Ohio Rev. Code § 1302.09, U.C.C. 2-206, provides that performance constitutes acceptance, and that 1302.10(C) must be read with the other provisions of Section 1302.10, i.e. U.C.C. 2-207(1) and (2), and its "battle of the forms" provisions only apply when acceptance or confirmation of an offer is met with new or additional terms; an event which did not occur in the PPG/ Mantaline transaction, but which did occur in the Sixth Circuit's prior *McJunkin* opinion. The court concluded:

> Because PPG's purchase order constituted the sole "offer", and Mantaline's shipment of conforming goods constituted an unqualified "acceptance" of the offer, the resulting contract included the terms of PPG's purchase order providing for indemnification and arbitration of disputes.

(Petition for Writ of Certiorari Appendix at 11a). The Circuit Court consequently reversed the judgment of the district court and remanded the case for further proceedings consistent with its opinion.

REASONS FOR DENYING THE WRIT

The Court of Appeals' opinion in this case was premised upon three conclusions. First, Petitioner's standard quotation form, by its equivocating reservation of final contract approval, was simply an invitation to deal, without legal effect under Ohio law. This is a basic conclusion of traditional contract law. *See* Restatement (Second) of Contracts § 26 ("A manifestation of willingness to enter into a bargain is not an offer if the person to whom it is addressed knows or has reason to know that the person making it does not intend to conclude a bargain until he has made a further manifestation of assent."). Second, PPG's order, which expressly anticipated acceptance by performance, was accepted by Petitioner's performance which was not accompanied by any objection or proposed additions to PPG's terms. Again, this comports with Ohio law, and the common law generally. *See* Ohio Rev. Code § 1302.09(A)(2) ("an order . . . shall be construed as inviting acceptance . . . by prompt shipment of conforming or non-conforming goods."); Restatement (Second) of Contract § 30(1). Third, the Court of Appeals held that the terms of the contract were those of PPG's offer, which was accepted by Petitioner's performance and that Petitioner's failure to object to PPG's terms prevented application of Ohio Rev. Code § 1302.10. Again, the conclusion is not surprising; the terms of a contract are those of the offer, accepted by the offeree. Since the founding of the Republic, it has been "an undeniable principle of the law of contracts" that acceptance without reservation creates a contract "according to the terms in which the offer was made." *Eliason v. Henshaw*, 17 U.S. 225, 227 (1819). The Sixth Circuit's conclusions of law are in accord with a host of authority, around the country, construing other state's versions of the U.C.C. *See infra*.

Given the foregoing facts and conclusions of law, the Petition is without merit. This case does not involve an important question of federal law that has not been but should be decided by the Court. Sup. Ct. R. 10(c). This case does not turn on an important federal question which has been decided by a state court of last resort in a manner conflicting with another state court of last resort or federal courts of appeal. Sup. Ct. R. 10(b). There is no argument that the lower courts' practice departed from the accepted and usual course of judicial proceedings, or that the Sixth Circuit's judgment conflicts with a state court of last resort on an important federal question. Sup. Ct. R. 10(a).

Rather, dissatisfied with the Court of Appeals' clear cut conclusions of basic Ohio contract law, Petitioner asserts two issues for the Court's review; the alleged deprivation of its right to a jury trial and an alleged conflict, regarding the application of state law, between the Sixth and Fifth Circuits. The Petition betrays a misunderstanding of the law governing contract formation, its effect on the rights of the parties, and the role of the Uniform Commercial Code in our federal system; points to which Respondent now turns.

I.

THE OPINION AND JUDGMENT OF THE COURT OF APPEALS WAS, PROPERLY, PREMISED UPON STATE LAW

As the Court has noted, when deciding whether the parties have agreed to arbitrate, courts "should apply ordinary state-law principles that govern the formation of contracts." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944

(1995). This is precisely what the lower courts did in this case. As Petitioner noted in the Court of Appeals:

> [t]he central issue in this case is whether the District Court properly determined that Ohio Revised Code § 1302.10(C) prevents . . . PPG Industries, Inc.'s . . . purchase order provisions, which conflict with those contained in . . . Mantaline Corporation's quotation from becoming the sole terms and conditions applicable to their contract for the sale and purchase of window gaskets.

(Petition for Writ of Certiorari Appendix at 59a). In other words, the courts below interpreted Ohio law governing contract formation to determine whether the parties had, by their written terms and conduct, agreed to arbitrate. As the Court has noted: "a challenge to state-law determinations by the Court of Appeals will rarely constitute an appropriate subject of this Court's review." *Haring v. Prosise*, 462 U.S. 306, 314 n.8 (1983).

Apparently, despite the fact that Petitioner has, as a matter of law, entered into a contract calling for arbitration, Petitioner believes that its standard quotation form illustrates it had not consented to arbitration, and hence a conclusion that it agreed to arbitrate conflicts with the Court's opinions in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995) and *Volt Information Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989). These opinions, however, and the Federal Arbitration Act itself, require an agreement to arbitrate, a matter decided under state law of contract formation. Petitioner simply fails to recognize the consequences of its actions. Under Ohio

law, by performing without objection, Petitioner accepted the terms and conditions of PPG's offer as forcefully and fully as if it had signed an acceptance. It is hardly unusual for a Court to find that conduct such as performance manifests assent to a bargain. *United States ex rel. Modern Electric, Inc. v. Ideal Electronic Security Co., Inc.*, 81 F.3d 240, 244 (D.C. Cir. 1996) ("a purchase order may stand as an offer with performance of its terms constituting acceptance * * * [t]his principle is well-recognized, even outside District of Columbia common law."). Petitioner's complaint to this Court is simply one shared by every litigant who denies being party to an arbitration agreement.

II.

THE COURT OF APPEALS DID NOT ADDRESS THE CLAIMED VIOLATION OF PETITIONER'S RIGHT TO TRIAL BY JURY, NOR IS THAT RIGHT IMPLICATED BY THE SIXTH CIRCUIT'S JUDGMENT

Apparently in an attempt to shoehorn a federal issue into its state-law objections, Petitioner claims that the Sixth Circuit's determination that the contract includes an arbitration clause deprives Petitioner of its constitutional right to a jury trial. There are numerous logical and procedural difficulties with Petitioner's request for review of this "issue".

First, in the Sixth Circuit, the only discussion of a violation of Petitioner's jury trial right was the bare assertion, in Petitioner's appellate brief, that requiring arbitration would violate Petitioner's jury trial right under the United States and Ohio Constitutions. (Petition for Writ of Certiorari Appendix at 82a). Petitioner never discussed why such a

violation would occur, nor did the Sixth Circuit address this assertion. There is good reason for the disregard of Petitioner's jury-trial argument: "the loss of the right to a jury trial is a necessary and fairly obvious consequence of an agreement to arbitrate." *Pierson v. Dean, Witter, Reynolds, Inc.*, 742 F.2d 334, 339 (7th Cir. 1984). Petitioner improperly asks this Court to review a phantom issue which received no substantive attention from either the parties or the courts below. *See Perry v. Thomas*, 482 U.S. 382, 492 (1987) ("[w]e likewise decline to reach [plaintiff's] contention that [defendants] lack 'standing' to enforce the agreement to arbitrate any of these claims, since the courts below did not address this alternative argument for refusing to compel arbitration."). *See also J. Truett Payne Co., Inc. v. Chrysler Motors Corp.*, 451 U.S. 557, 568 (1981) ("We do not ordinarily address for the first time in this Court an issue which the Court of Appeals has not addressed. . . ."). Moreover, even if the Court of Appeals had addressed the issue of Petitioner's jury trial right, and there was, in fact, a record-based issue for the Court to review, the underlying premise of Petitioner's jury trial question is incorrect for two reasons.

First, as noted above, the waiver of the right to a jury is a necessary consequence of Petitioner's agreement to arbitrate. In accordance with black-letter law, the Sixth Circuit found an agreement to arbitrate. A jury trial right is no more or less implicated in this case than in every case in which a party, over its objections, has been found to have agreed to arbitration. Further, Petitioner would simply not be entitled to a jury's determination of whether it agreed to arbitrate; under Ohio law the construction of written contracts and instruments is a matter of law, the jury simply determines breach. *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St. 2d

241, 374 N.E.2d 146, 148 (1978). Plaintiff's alleged jury trial right is, necessarily, subsumed within the state law question decided by the Sixth Circuit.

Second, as this Court has mandated, the lower courts determined whether the parties had agreed to arbitrate in accordance with state law. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). The lower courts did what judges do every day — determine whether the parties had reached a contract, and what the terms of that contract were. Petitioner's argument that its jury trial right is implicated by the Circuit Court's state law conclusion is nothing more than an obvious attempt to alter state law for one reason alone — an arbitration provision is contained within the agreement at issue. Such an argument, of course, flies in the face of the Federal Arbitration Act, and the cases decided thereunder, wherein Congress and the federal courts have sought to ameliorate vestigial judicial hostility to arbitration. As the Court has noted:

> [a] court may not, then, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law. Nor may a court rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what we hold today the state legislature cannot.

Perry v. Thomas, 482 U.S. 483, 492 n.9 (1987).

III.

THE COURT OF APPEALS' DECISION WAS CONSISTENT WITH OHIO LAW, WITH THE UNIFORM COMMERCIAL CODE, AND IS NOT IN CONFLICT WITH THE LAW STATED BY THE FIFTH CIRCUIT

Finally, Petitioner argues that the Sixth Circuit's opinion is a "judicial modification of § 2-207(3) of the Uniform Commercial Code [and] conflicts with the ruling of the Fifth Circuit Court of Appeals. . . ." (Petition for Writ of Certiorari at 9). Petitioner's argument is premised upon a misunderstanding of the law of contract formation, the Fifth Circuit's holding in *Axelson, Inc. v. McEvoy-Willis*, 7 F.3d 1230 (5th Cir. 1993), and the role of the Uniform Commercial Code in our federal common law system. Respondent will address these three points in turn.

A. THE COURT OF APPEALS LOGICALLY APPLIED OHIO'S U.C.C. STATUTES IN A MANNER CONSISTENT WITH THE COURTS THAT HAVE ADDRESSED THE ISSUES RAISED.

As the Sixth Circuit noted, Petitioner reads Ohio Rev. Code § 1302.10(C) [U.C.C. 2-207(3)] "in isolation". (Petition for Writ of Certiorari Appendix at 6a). Petitioner suggests that so long as there are any conflicting "writings", combined with performance, Article 2 of the U.C.C. demands that the terms of the sales contract are limited to those to which the parties' writings agree. For obvious reasons, the Sixth Circuit rejected this argument — under the very terms of the U.C.C. (and, for that matter, the common law), a written offer can be accepted by performance. A true "battle of the forms" occurs when the "expression of acceptance or

written confirmation . . . states terms additional or different from those offered or agreed." Ohio Rev Code § 1302.10(A) [U.C.C. 2-207(1)]. This is the very purpose of the Section — under the common law an acceptance containing differing terms constituted a counter-offer. Petitioner's problem is that it whole-heartedly accepted PPG's offer; there was no counter-offer to invoke a battle-of-the-forms.

As the Court has noted: "[i]t is our practice to accept a reasonable construction of state law by the Court of Appeals 'even if an examination of the state-law issue without such guidance might have justified a different conclusion.' " *Haring v. Prosise*, 462 U.S. 306, 314 (1983) (*quoting Bishop v. Wood*, 426 U.S. 341, 346 (1976)). It goes without saying that the Sixth Circuit's approach to Ohio Rev. Code § 1302.10 is entirely reasonable. Indeed, it is consistent with the opinions of other federal courts interpreting other states' versions of U.C.C. 2-207. *See, e.g., Litton Systems, Inc. v. Leviton Mfg. Co., Inc.*, 15 F.3d 790, 784 (8th Cir. 1994) (applying Minnesota law); *Gulf States Utilities Co. v. NEI Peebles Electric Products, Inc.*, 819 F. Supp. 538 (M.D. La. 1993) (applying California law); *Technographis, Inc. v. Mercer Corp.*, 777 F. Supp. 1214 (M.D. Pa. 1991), *aff'd*, 26 F.3d 123 (3rd Cir. 1994) (applying Pennsylvania law). *See also Audio Visual Associates, Inc. v. Sharp Electronics Corp.*, 210 F.3d 254, 259 (4th Cir. 2000) (applying Maryland law). In fact, for at least thirty years, federal courts, applying the U.C.C., have found arbitration clauses to be included in sales contracts under the precise facts presented here: price quotation, followed by purchase order containing arbitration clause, followed by performance without objection to the purchase order's terms. *See Universal Oil Products Co. v. S.C.M. Corp.*, 313 F. Supp. 905 (D. Conn. 1970) (applying

Connecticut law). Despite this logical consistency of approach, Petitioner nonetheless argues both that the Fifth Circuit's *Axelson* opinion is to the contrary and that such a contrary conclusion warrants the attention of the United States Supreme Court. Both arguments suffer in several respects.

B. THERE IS NO CONFLICT BETWEEN THE SIXTH CIRCUIT DECISION, UNDER OHIO STATE LAW, AND THE FIFTH CIRCUIT'S *AXELSON* OPINION.

The Fifth Circuit's opinion in *Axelson* certainly is not contrary to the Sixth Circuit's conclusions in this case — a fact specifically noted by the Sixth Circuit itself. (Petition for Writ of Certiorari Appendix at 10a). Despite the fact that the Fifth Circuit applied Texas law in its case, Petitioner cannot point to one statement of law in *Axelson* which contradicts the Sixth Circuit's judgment in this case. The reason for this lack of contradictory terms is that the *Axelson* panel examined three possible resolutions of an alleged battle of forms question, which arise under facts much more convoluted and strikingly different than those involved here.

In brief, *Axelson* involved a seller's quotation that did not contain a damage limitation provision, followed by the buyer's letter of intent that did not contain the damage limitation provision at issue, followed by the commencement of the seller's performance, followed, at last and three months later, by the buyer's "official" purchase order, which contained the objectionable damage limitation provision at issue.

The Fifth Circuit addressed three possible alternatives: (1) the quotation was an offer that was accepted by a letter of intent, (2) the letter of intent was an offer that was accepted by the seller, or (3) that the conduct of the parties recognized the contract — the approach presumably appealing to Petitioner in this case. The Fifth Circuit found no need to adopt any approach, and expressly made its holding "[a]lternatively", because "[r]egardless of which of the above approaches we take, the result is the same." *Axelson,* 7 F.3d at 1231, 1234 (5th Cir. 1993). Petitioner has neglected to inform the Court of an important point: one of the Fifth Circuit's alternative approaches in *Axelson*, based on contractual offer and acceptance, was entirely consistent with the reasoning of the Sixth Circuit and other courts.

C. EVEN IF THERE WAS A CONFLICT AMONG THE CIRCUITS REGARDING THE SUBSTANTIVE CONSTRUCTION OF TWO DIFFERENT STATES' LAWS, REVIEW BY THE SUPREME COURT IS INAPPROPRIATE.

Finally, the Petition ignores a basic premise of our federal system. Even if the Fifth Circuit's *Axelson* opinion was contrary to the Sixth Circuit's opinion in this case, such a divergence of opinion is the expected (and some would argue preferable) result of our federal system. The Uniform Commercial Code is not a federal law, but is the product of a joint effort by the American Law Institute and the National Conference of Commissioners on Uniform State Laws. Despite its name, the U.C.C. is certainly not uniform: "every state has modified the official text of the U.C.C. in one way or another." McLaughlin, *The Evolving Uniform Commercial Code: From Infancy to Maturity to Old Age*, 26 Loy. L.A. L. Rev. 691, 692 (1993).

Moreover, even if the state legislatures had enacted an identical Code and had renounced both their own independent *amendments and the numerous subsequent revisions and* amendments proposed by the U.C.C.'s academic authors, the U.C.C. was and is still destined for common law divergence of application. The Act itself provides for common law supplementation of its terms, Ohio Rev. Code § 1301.03 [U.C.C. 1-103] and, significantly for our purposes, "does not define key terms such as 'offer', 'acceptance' and 'possession', thus requiring courts to utilize common-law definitions of these terms when applying the Code." McLaughlin, *The Evolving Uniform Commercial Code: From Infancy to Maturity to Old Age*, 26 Loy. L.A. L. Rev. 691, 692 (1993). In short, from its beginning, the U.C.C. would inevitably be subject to change by fifty legislatures and would inevitably be subject to interpretation by fifty state court systems and the various federal courts exercising diversity jurisdiction.

Contrary to the Petitioner's implicit suggestion, a bit of state law divergence, even if it existed, is not necessarily a bad thing. This is "one of the happy incidents of the federal system"; the laboratory of the law. *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). The Petition asks for the remarkable from this Court — the exercise of its jurisdiction to resolve a phantom conflict between one court's construction of a Texas state law and another court's construction of an Ohio state law.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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